



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

January 25, 2006

The Honorable David L. Babson, Jr.
House Environment and Agriculture Committee
LOB 303
Concord, NH 03301

Re: HB 1571, relative to reports of legislative standing committees on environmental legislation and relative to the adoption of rules concerning environmental regulation

Dear Representative Babson and Members of the Committee:

Thank you for the opportunity to comment on HB 1571, relative to reports of legislative standing committees on environmental legislation and relative to the adoption of rules concerning environmental regulation. The bill would require "a statement of the credible and sound scientific basis" for any proposed environmental legislation or rules that would "restrict the use, improvement, maintenance, or repair of privately-owned property," including legislation or rules relating to "such subjects as water or air pollution control, shoreline and land management, waste management, technology requirements, uses of natural resources, and utilities controls." The statement must "show that the harm to be prevented is justified relative to the cost of compliance." The Department of Environmental Services does not support this bill, for the reasons that follow.

First, it is unclear what the "credible and sound scientific basis" must actually be. Would there have to be studies that affirmatively show that harm actually will occur in the absence of the regulation? For some areas, such as regulating air emissions that have been shown to cause cancer, this may not be an issue. However, what if no studies have been done, but as a matter of logic it is clear that regulation in a particular area is needed or otherwise desirable? Many reasonable statutes have been enacted, and rules adopted, based on a desire to prevent a harm that might occur and that cannot necessarily be quantified rather than to address a harm that has already occurred. In such situations, it may not be possible to show, as a matter of science, "that the harm to be prevented is justified relative to the cost of compliance" (p. 1, line 10) because the full cost of the harm cannot be estimated.

Related to this, it is not clear what the "cost of compliance" would be for legislation or rules that would prevent an activity rather than affect how it can be carried out. For example, what is the "cost of compliance" of not being allowed to build a residence or business within 50 feet of the reference line of a surface water that is subject to RSA 483-B, the Comprehensive Shoreland Protection Act? If the agency assigned a cost of zero dollars because the requirement only applies prospectively (so no one has to undertake renovations to comply with it), would that assessment be subject to challenge?

Also, what if an "environmental" bill or rule is not actually based on a scientific premise but on some other premise? For example, RSA 482-A:26 prohibits construction of dwellings over public waters -- not primarily for an "environmental" reason (although there certainly are environmental benefits), but because of the State's public trust interest in public waters. Under the proposed bill, would this provision not have been allowed because a statement of its "credible and sound scientific basis" could not be made? Further, many statutes and rules relate to the process by which determinations are made regarding proposed activities. Would administrative procedures, such as what information must be supplied to

obtain a particular environmental permit or how a hearing to resolve an environmental enforcement action would be conducted, be subject to the requirement to provide the "statement"? If so, how would one demonstrate the "credible and sound scientific basis" of a proposed administrative procedure?

Further, the bill is unclear as to what format the "statement" must be in. Would a simple affirmative statement that there is indeed a "credible and sound scientific basis" and that the prevented harm outweighs the cost of compliance suffice? Would the statement have to include an economic analysis by an appropriately-credentialed professional? Would the statement have to reference scientific and/or economic studies, or include excerpts from or copies of such studies? Would the studies have to be peer-reviewed and accepted by some prominent, presumably-reputable, scientific (or economic) organization?

Finally, it is unclear what happens if someone disagrees with the "statement" made by a legislative committee. (For agencies, presumably the consequence is that the Joint Legislative Committee on Administrative Rules ("JLCAR") could enter an objection (ref. p. 2, lines 1-10).) Reasonable minds can differ, especially in areas where new discoveries are being made. For instance, global warming is a "credible and sound scientific basis" for limiting greenhouse gas emissions for many countries throughout the world and even for many cities and states within the United States, but there also are "scientists" who disagree with the studies and conclusions re: greenhouse gas emissions. If someone disagrees, no matter how reasonable or unreasonable the disagreement might be, does that mean that the legislation cannot be enacted or, if enacted, is invalid?

Under the existing rulemaking process established in RSA 541-A, agencies are asked to assess the fiscal impact of proposed rules on political subdivisions, citizens, and independently-owned businesses. A mechanism thus already exists to provide information on costs and benefits for the public and the JLCAR to consider when reviewing rules. There is no corresponding requirement for proposed legislation (only impacts to state, county, and local governments are considered). If an assessment of the cost impact to all political subdivisions, citizens, and businesses were required for all legislation, then all legislation, not just environmental legislation, could be assessed for its fiscal impact relative to the policy issues sought to be addressed. This would appear to be a much sounder legislative policy than the one proposed in HB 1571.

Thank you for your consideration of these comments. If you have any questions, please contact Michael Walls, Assistant Commissioner, at 271-8806 or mwalls@des.state.nh.us, or Gretchen Hamel, Legal Unit Administrator, at 271-3137 or ghamel@des.state.nh.us.

Sincerely,


for Michael P. Nolin
Commissioner

cc: Representative Edward P. Moran
Representative Daniel C. Itse
Representative Patricia A. Dowling